IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 1ST OCTOBER 2007 / 9TH ASWINA 1929

SA.No. 903 of 1994(G)

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AGAINST THE ORDER DATED 28/02/1994 IN A.S.122/86 IN
AS.119/1986 of SUB COURT, OTTAPPALAM
OS.63/1985 of MUNSIFF COURT, OTTAPPALAM

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APPELLANT/1ST RESPONDENT IN AS NOS.119/86 & 122/86/PLAINTIFF:

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M.V.KADER, SON OF MOIDEEN,
P.O.MEZHATHOOR, VIA THRITHALA,
OTTAPALAM TALUK, PALGHAT DISTRICT.

BY ADV. SMT.S.JAYASREE

RESPONDENTS/APPELLANTS AND R2 IN AS NO.119/86 AND RESPONDENTS 2 & 3 IN AS NO.122/86/DEFENDANTS:

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1. MUNEERUL ISLAM MADRASA,
KOOTTANAD, REPRESENTED BY ITS
SECRETARY, P.C.MOIDEENKUTTY,
S/O.CHEEKU, P.O.KOOTTANAD,
OTTAPALAM TALUK, PALGHAT DISTRICT.

2. THE PRESIDENT,
MUNEERUL ISLAM MADRASA,
KOOTTANAD, P.O.KOOTTANAD,
OTTAPALAM TALUK, PALGHAT DISTRICT.

3. K.P.BAVA, SON OF MOIDEEN,
KALLINGAL PEEDIKAYIL HOUSE,
NAGALASSERY AMSOM, THEKKEVAVANNOOR DESOM,
OTTAPALAM TALUK, PALGHAT DISTRICT.

BY ADV. SRI.TPM.IBRAHIM KHAN (FOR R1 & R2)
SRI.M.V.IBRAHIMKUTTY (FOR R3)

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 01/10/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

JP

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 903 OF 1994

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DATED THIS THE 1ST DAY OF OCTOBER, 2007

**JUDGMENT**

Plaintiff in O.S.63 of 1985 on the file of Munisff-Magistrate Court, Pattambi is the appellant. Respondents are defendants. Second respondent was impleaded later as the President of first respondent Madrassa. First respondent is represented by its Secretary. It is admitted case that an old building belonging to Madrassa, occupied by several tenants were later got vacated and reconstructed by respondent Madrassa. Appellant was admittedly originally a building tenant in one of the rooms. It was vacated and the entire building was demolished and a new building was reconstructed. According to appellant, he surrendered the building after entering into an agreement with respondent whereunder respondent agreed to give back one room to the appellant for continuing his hotel business. It was contended that an oral agreement was entered into in the presence of mediators on 15.11.1983. Though it was contended that the agreement was entered into in the presence of mediators, the name of the mediators were not disclosed in the plaint. So also, the place at which the agreement was entered

into was not mentioned. Contending that after reconstruction of the building, respondent Madrassa did not hand over possession of one room to him, though rooms were given to some other tenants, suit was filed seeking a decree for mandatory injunction directing respondent Madrassa to hand over one room to the appellant. Subsequently the plaint was amended deleting that prayer and seeking a decree for specific performance of the agreement dated 15.11.1983 directing respondent Madrassa to put appellant in possession of the building. First respondent, in the written statement denied the agreement. It was contended that there was no agreement whatsoever to hand over a room in the reconstructed building to appellant and therefore he is not entitled to the relief sought for. After the plaint was amended, an additional written statement was filed contending that there was no agreement and therefore appellant is not entitled to a decree for specific performance of the agreement. Subsequently, 3rd respondent was impleaded as the person to whom the room claimed by appellant was given by first respondent, Madrassa.

2. Learned Munsiff, on the evidence of PWs 1 to 8, Dws 1 to 3, Exts.A1 to A11, Exts.B1 to B10, Ext.C1 and Ext.X1 upheld

the case of oral agreement and granted a decree directing respondents to put appellant in possession of the plaint schedule building after accepting Rs.5000/- as advance and Rs.400/- as monthly rent. Defendants 1 and 2 challenged the decree and judgment before Sub Court, Ottapalam in A.S.119 of 1986. Third defendant filed A.S.122 of 1986. Learned Sub Judge heard both the appeals together. On reappreciation of evidence, learned Sub Judge held that appellant did not establish the oral agreement and therefore he is not entitled to the decree granted by the trial court. Appeal was allowed and suit was dismissed. It is challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1)When appellant vacated the premises on the assurance of responsible members of the Construction Committee, who are also members of Madrassa Committee that one room will be realloted to plaintiffs, whether respondents are entitled to deny the benefit to the plaintiff.

2)When trial court had the benefit of noting the demeanour of witnesses and accepting the oral agreement, whether first appellate court was justified in interfering with the decree

granted.

4. Learned counsel appearing for the appellant and respondents 1 and 2 were heard.

5. Learned counsel appearing for appellant argued that what was contended by respondents in the written statement was a total denial of existence of an agreement and evidence of PW2 supported by relevant entries in Ext.X1 file establish that the Reconstruction Committee had entered into an agreement with the tenants and the tenants agreed to surrender the portions of the building in their possession to enable the Madrassa to reconstruct the building on the condition that they will be given rooms in the reconstructed building and so first appellate court should not have interfered with the findings of trial court when the oral agreement was accepted by the trial court believing the witnesses examined on the side of appellant. It was argued that evidence of PW2 establish that the members of Madrassa committee are also the members of the Reconstruction Committee and the copy of the letter at page 56 of Ext.X1 file establish that there was an agreement as claimed by appellants and therefore first appellate court should have confirmed the decree granted by the trial court.

6. Learned counsel appearing for respondents pointed out that even though an oral agreement was set up in plaint, the details are not pleaded. It was pointed out that though it was contended that plaintiff entered into an agreement with the defendant, it is not stated whether that agreement was with the Secretary or President of the Committee or the Madrassa or Reconstruction Committee and even the name of the alleged mediators were not disclosed in the plaint. It was also argued that when the case in the plaint was that there was an agreement between appellant and respondent, Madrasa, the case sought to be proved was an agreement between the Reconstruction Committee and all the tenants and not an independent agreement as alleged in the plaint and in such circumstances, the oral agreement cannot be accepted and findings of first appellate court is perfectly correct and warrants no interference.

7. The suit was originally filed only for a mandatory injunction setting up a case of an agreement entered into between appellant and respondent Madrassa. Subsequently, the relief was substituted by a decree for specific performance of the agreement dated 15.11.1983. When an oral agreement is set up,

it is mandatory that details of the agreement, persons who are present, are all to be pleaded. Even though it is stated in the plaint that the alleged agreement was entered into in the presence of mediators, even the names of the mediators were not disclosed. When examined as PW1, what was stated by PW1 was that agreement was entered into with Pokker, Bapputty and Aathankutty. They are admittedly neither the President nor the Secretary of the Madrassa committee or Reconstruction Committee. When the case in the plaint was that agreement was entered into with Madrassa Committee, evidence of PW1 was that agreement was entered into with Pokker, Bapputty and Aathankutty. Even when it was suggested to PW1 that they were not even members of Madrassa committee, answer of PW1 was that he is not aware whether they are members or not. Therefore, on the very face of the conflicting pleading and evidence, the oral agreement can only be rejected.

8. As against the case pleaded what was sought to be proved by examining PW2 and producing Ext.X1, which is said to be the file of the Reconstruction Committee retained by PW2, the General Secretary of Reconstruction Committee was different. According to the evidence of PW2, agreement with

the tenants was entered into not by office bearers of Madrassa Committee or even by the Madrassa Committee but by the Reconstruction Committee. Ext.X1 file itself establish that several committees were formed by the Madrassa Committee, to enable the Madrassa Committee to reconstruct the building. Even Committees at Abudhabi were formed for that purpose. There is no case for the appellant that any of these committees was authorised to enter into an agreement with the tenants so that, agreement if any entered into by the Committee, will be binding on the Madrassa committee. Appreciating all these material facts, I cannot agree with the argument of learned counsel appearing for appellant that the oral agreement set up by appellant should have been upheld by first appellate court. When the case of appellant could be accepted only on believing the oral evidence adduced and first appellate court which had all the powers of the trial court after proper reappreciation of oral evidence entered into a factual finding that evidence do not establish existence of an oral agreement, it is not for this court to reappreciate the evidence and substitute the findings of this court to the final fact finding court. The position is settled by the Apex Court in **Vinoth V. Seshamma**l (2006(5) SCC 545). It

was held:

> “It is not within the domain of the High Court to investigage the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not oridinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in

> second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence".

On the evidence first appellate court rightly found that appellant did not establish the oral agreement and is not entitled to the relief sought for. There is no merit in the appeal.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-